LIBRARY
SUPREME COURT U. S.

FILED
JUN 11 1968
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE

UNITED STATES

October Term 1968

No. [redacted] 481

SAMSON MARKET COMPANY, INC., a California corporation,

Appellant,

vs.

EDWARD J. KIRBY, DIRECTOR OF THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA,

Respondent.

Appeal from the Decision of the Alcoholic Beverage Control Appeals Board of the State of California, of the Court of Appeal of the State of California, Second Appellate District, Division Two, 2nd Civil No. 32948, and of the California Supreme Court

JURISDICTIONAL STATEMENT

JACQUES LESLIE
LAWRENCE TEPLIN
9255 Sunset Blvd.
Suite 920
Los Angeles, Calif.

Attorneys for Appellants

IN THE

SUPREME COURT OF THE

UNITED STATES

October Term 1967

No. _____

SAMSON MARKET COMPANY, INC.,
a California corporation,

Appellant,

vs.

EDWARD J. KIRBY, DIRECTOR OF
THE DEPARTMENT OF ALCOHOLIC
BEVERAGE CONTROL OF THE
STATE OF CALIFORNIA,

Respondent.

Appeal from the Decision of the
Alcoholic Beverage Control Appeals
Board of the State of California, of
the Court of Appeal of the State of
California, Second Appellate District,
Division Two, 2nd Civil No. 32948
and of the California Supreme Court

JURISDICTIONAL STATEMENT

JACQUES LESLIE
LAWRENCE TEPLIN
9255 Sunset Blvd.
Suite 920
Los Angeles, Calif.

Attorneys for Appellants

TOPICAL INDEX

	Page
Table of Authorities	iii
PRIOR PROCEEDINGS.	1
GROUNDS ON WHICH JURISDICTION OF THE SUPREME COURT IS INVOKED.	2
QUESTIONS PRESENTED BY THIS APPEAL.	4
FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED.	5
A SUBSTANTIAL FEDERAL QUESTION IS INVOLVED IN THE PROPOSED APPEAL.	7
CONCLUSION	17
APPENDIX "A"	
Opinion of the Alcoholic Beverage Control Appeals Board of the State of California	A-1
APPENDIX "B"	
California Business and Professions Code §24755	B-1

Page

APPENDIX "C"

Rule 99, California Administrative Code C-1

APPENDIX "D"

NOTICE OF DEFENSE UNDER SECTION 11505 OF THE GOVERNMENT CODE. REQUEST FOR HEARING D-1

APPENDIX "E"

REQUEST FOR GROUNDS FOR REVIEW E-1

TABLE OF AUTHORITIES

Cases	Page
Allied Properties v. Department of Alcoholic Beverage Control, 53 Cal. 2d 141, 346 P. 2d 737	7, 8, 10, 11, 15
Terry Carpenter v. Nebraska Liquor Control Commission, 120 N. W. 2d 374 (Neb.)	10
Cohen v. Kirby, U. S. Supreme Court, October Term, 1967	6
Dave's Market v. Department of Alcoholic Beverage Control, 222 Cal. App. 2d 671	14
Dave's Market v. Department of Alcoholic Beverage Control, D. C. N. D. Calif. No. 41103	17
De Martini v. Department of Alcoholic Beverage Control, 215 Cal. App. 2d 787	14
Drink, Inc. v. Babcock, 421 P. 2d 798 (N. Mex. S. Ct.)	9
Eastman Kodak v. Federal Trade Commission, 330 U. S. 828	14

Cases	Page
Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 12 L. Ed. 2d 350, 84 S. Ct. 1293	15
Lombardo Wine Co. v. Taylor, 95 N. E. 2d 60 (Ill.)	10
Oliver v. Oklahoma Alcoholic Beverage Control Board, 359 P. 2d 183 (Okla. 1966)	10
Reimel v. Alcoholic Beverage Control Appeals Board, 256 A. C. A. 188	6
Reynolds v. Louisiana, Board of Alcoholic Beverage Control, 185 So. 2d 794 (La. 1966), cert. denied U. S. Law Week 3173, Nov. 14, 1966	9
Scarborough v. Webbs Cutrate Drug Company, 150 Fla. 754, 8 So. 2d 913 (1942)	10
Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1950)	14
Seagram & Sons v. Hostetter, 384 U.S. 35, 16 L. Ed. 2d 336, 86 S. Ct. 1254	3, 15, 16

Cases	Page
Standard Oil Company of California v. Johnson, 316 U.S. 481	3
State v. Mermes, 358 P. 2d 936 (Kan. 1961)	10
United States v. McKesson & Robbins, 351 U.S. 305 (1953)	14
Wilke and Holzheiser v. Department of Alcoholic Beverage Control, 65 Cal. 2d 385, 420 P. 2d 735, 55 Cal. Rptr. 44	6, 7, 8, 11, 12, 15, 16
Wilke and Holzheiser v. Department of Alcoholic Beverage Control, 266 F. Supp. 168	8, 17

Constitution

United States Constitution:	
Fifth Amendment	4, 7
Fourteenth Amendment	4, 7, 12, 13, 15
Twenty-First Amendment	15

Statutes

California Administrative Code, Title 4	
Rule 99	4, C-1

Statutes	Page
California Business & Professions Code:	
§23090, et seq.	3
§24755	2, 4, 5, 6, 7, 8, 13, B-1
15 U.S.C.A. §1	4, 7, 13, 14
15 U.S.C.A. §2	4, 7
15 U.S.C.A. §45	4, 7, 13, 14
28 U.S.C.A. §1257(2)	3

Miscellaneous

Report of Moreland Commission on the Alcoholic Beverage Control Law, New York	15, 16

IN THE

SUPREME COURT OF THE

UNITED STATES

October Term 1967

No. _____

SAMSON MARKET COMPANY, INC.,
a California corporation,

Appellant,

vs.

EDWARD J. KIRBY, DIRECTOR OF THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA,

Respondent.

Appeal from the Decision of the Alcoholic Beverage Control Appeals Board of the State of California, of the Court of Appeal of the State of California, Second Appellate District, Division Two, 2nd Civil No. 32948 and of the California Supreme Court

JURISDICTIONAL STATEMENT

PRIOR PROCEEDINGS

This is an appeal by a retail liquor licensee

from an order of the Department of Alcoholic Beverage Control of the State of California revoking the Appellant's liquor license. The Alcoholic Beverage Control Appeals Board of the State of California sustained said order in an unreported decision, appended hereto as Appendix "A". The appellant petitioned the Court of Appeals of the State of California, Second Appellate District for a Writ of Review to review the Appeals Board's Order. Said petition was rejected, without opinion, by the Court of Appeals. A petition for Hearing and/or Writ of Review was made to the California Supreme Court which denied the petition without opinion on May 22, 1968. The orders of denial are filed concurrently herewith as part of the certified record.

GROUNDS ON WHICH JURISDICTION OF THE SUPREME COURT IS INVOKED.

The proceedings in the State Court arise out of administrative proceedings before the Department of Alcoholic Beverage Control of the State of California for violations of §24755 Business and Professions Code of the State of California, the California Mandatory Retail price fixing law. The Department ordered the licensee revoked for sales of liquor below mandatory retail prices which had been filed by liquor distillers with the State of California.

Appellant duly appealed to the Alcoholic Beverage Control Appeals Board, a State body

set up by the California Constitution to review decisions of the Department. Said Appeals Board affirmed the decision of the Department on State grounds, although the Federal grounds had also been raised. Such affirmation was filed on March 13, 1968.

Section 23090, et seq. of the Business and Professions Code of the State of California allows review of the Department and Appeals Board's decisions only by Petition for Writ of Review, akin to certiorari. Such a petition was made to the Court of Appeals, Second Appellate District. Said Court denied the Petition for Writ of Review on April 24, 1968.

Petition for Hearing was made to the California Supreme Court and a hearing was denied on May 22, 1968.

Notice of Appeal was filed in the Court of Appeals of the State of California, Second Appellate District on June 5, 1968, said Court being the highest state court in which a decision could be had.

This is an appeal pursuant to 28 U.S.C.A. 1257(2). Among the cases believed to sustain jurisdiction are Seagram & Sons v. Hostetter, 384 U.S. 35 and Standard Oil Company of California v. Johnson, 316 U.S. 481.

The California Statutes and laws which appellant claims to be in violation of the United States Constitution and the Federal Anti-Trust laws are California Business and Professions

Code, §24755, a copy of which is appended hereto as Appendix "B" and Title 4, California Administrative Code, Rule 99, appended hereto as Appendix "C".

QUESTIONS PRESENTED BY THIS APPEAL

The questions presented by this appeal are as follows:

1. Whether or not the California Liquor Price Fixing Laws (§24755 of the Business and Professions Code) are invalid as being in violation of the Anti-Trust Laws of the United States (15 U. S. C. A. §§ 1, 2 and 45), because they do not come within the exceptions provided in the Miller-Tydings or McGuire Acts and because prices are fixed for goods that are not in fair and open competition.

2. Whether or not §24755 Business and Professions Code and Title 4, Rule 99, California Administrative Code are violative of the Due Process Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution because:

(a) The statute sets up privileges for liquor manufacturers and wholesalers whereby the State of California at public expenses enforces the fixed price. Such enforcement is not provided for any other industry.

(b) Two different trading areas are set up within the State. No valid reason or legitimate purpose exists for either of the foregoing discriminatory practices.

(c) A state function is delegated to private industry without adequate, or indeed, any safeguards.

(d) Economically disadvantaged persons are required to purchase inferior goods and are prevented from taking advantage of quantity discounts. The statute, if effective, only enforces prohibition for the poor and not the wealthy.

FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

Appellant holds a license to sell alcoholic beverages. This license was revoked after an administrative hearing by the Department of Alcoholic Beverage Control for sales of alcoholic beverages below a minimum price filed by the wholesalers and manufacturers of the alcoholic beverages in violation of §24755 Business and Professions Code.

The federal questions were raised at all stages of the proceedings. Initially, in the notice of defense filed at the administrative level. The notice of defense is appended hereto as Appendix "D". The federal questions are

raised on pages D-5 to D-9, inclusive.

In the Notice of Appeal before the Appeals Board appended hereto as Appendix "E" the federal questions were raised at page E-2. The issues were overruled by the Appeals Board on page A-10 of its opinion (Appendix "A").

The federal issues are also set forth in the Petition for Writ of Review filed with the Court of Appeals at pages 19 to 23, inclusive and in the Petition for Hearing in the California Supreme Court. Said petitions are filed concurrently herewith as part of the certified record in this case.

In essence, the attitude of the California Courts has been that the constitutional issues have been settled in California by virtue of the cases of Wilke and Holzheiser v. Department of Alcoholic Beverage Control, 65 Cal. 2d 385 and Reimel v. Alcoholic Beverage Control Appeals Board, 256 A. C. A. 188 (now before this Court as Cohen v. Kirby, Oct. Term 1967).

By virtue of §24755 Business and Professions Code, a manufacturer of alcoholic beverages need only file a minimum price schedule for such beverages with the State of California and publish it in a trade journal. Thereafter, the State of California, at no expense whatsoever to the manufacturer enforces his minimum price by gathering evidence and prosecuting the violators. There is no state control of the price to be set. Only the manufacturer sets the price.

The rules of the Department allow a 10% discount on the minimum price for case purchases. There is also a substantial number of sales in California of non-brand name alcoholic beverages for which no minimum price is filed. These non-branded liquors are substantially cheaper than the branded items and are usually inferior in quality.

A SUBSTANTIAL FEDERAL QUESTION IS INVOLVED IN THE PROPOSED APPEAL

Petitioner alleges that §24755 of the California Business and Professions Code violates the Constitution of the United States in that it is violative of the Due Process Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, and further alleges that it is in conflict with the Sherman Anti-Trust Act (15 U.S.C.A., §§ 1, 2 and 45).

This State statute has been before the California Supreme Court twice in the last eight years, Allied Properties v. Department of Alcoholic Beverage Control, 53 Cal. 2d 141, 346 P. 2d 737, and Wilke & Holzheiser v. Department of Alcoholic Beverage Control, 65 Cal. 2d 349, 420 P. 2d 735.

The statute in question is California's mandatory price fixing statute for alcoholic beverages. Under the statute, manufacturers merely

file and publish the price at which their brands are to be sold. No state agency controls the price and the manufacturer is free to set any price he chooses for his product. Thereafter, the Department of Alcoholic Beverage Control enforces the price at no cost to the manufacturer and licensees are subject to suspension and/or revocation of their license for sales below the filed price.

The statute was first held to be constitutional in the Allied Properties case, supra, in 1959, by a four to three decision. In 1966, the California Supreme Court again consented to hear a case deciding the constitutionality of the statute, and in the Wilke and Holzheiser case, supra by a five to two decision, again held the statute to be constitutional.

It should be emphasized that §24755 is not a civil fair trade statute providing a civil remedy to persons aggrieved by sales below a fair trade price. It is a State administered statute providing for action by the State to enforce the manufacturer's prices through the offices of the Department of Alcoholic Beverage Control.

The Allied Properties case, supra, was not appealed to this Court. In the Wilke and Holzheiser case, supra, an application was made to a three Judge District Court which held that plaintiff's remedy was solely by way of appeal or petition for certiorari to the United States Supreme Court, 266 F. Supp. 168.

These are the first cases involving a ruling

on the constitutionality of the liquor price fixing statute of California where application has been made to this Court.

There is a sharp division of authority among the highest courts of other states as to the constitutionality of liquor price fixing statutes similar to California's statute.

The Louisiana Supreme Court in holding a mandatory liquor price fixing statute, that was similar to California's unconstitutional, stated that the statute:

> " . . . bears no real or substantial relation to the general health, morals or welfare of the people. At best, it represents an ignoble flight from competition."
>
> Reynolds v. Louisiana, Board of Alcoholic Beverage Control, 185 So. 2d 794, 812 (La. 1966) (Petition for Certiorari to U. S. Supreme Court denied, U. S. Law Week 3173, November 14, 1966).

The Supreme Court of New Mexico held in Drink, Inc. v. Babcock, 421 P. 2d 798, that the New Mexico statute,

> " . . . [was] not an appropriate exercise of the States' police power . . . . "
>
> 421 P. 2d at 803.

Perhaps the most succinct analysis of the true purpose of these liquor fair trade laws is contained in the decision of the Florida Supreme Court, holding such a law unconstitutional, wherein the court stated:

> "The act, upon its face, is one not designed to effect the public health, safety or welfare, but is designed solely for the protection of the wholesale liquor dealer by allowing him to control the retail prices so that his customers may be forced to sell liquor at a substantial profit. . . ."

Scarborough v. Webbs Cutrate Drug Company, 150 Fla. 754, 8 So. 2d 913, 922 (1942).

Similar liquor price fixing statutes have been held unconstitutional in Oklahoma in Oliver v. Oklahoma Alcoholic Beverage Control Board, 359 P. 2d 183 (1966); in Kansas in State v. Mermes, 358 P. 2d 936 (1961); in Illinois in Lombardo Wine Co. v. Taylor, 95 N. E. 2d 60; and in Nebraska in Terry Carpenter v. Nebraska Liquor Control Commission, 120 N. W. 2d 374.

In the Allied Properties case, supra, the dissenting judge in the California Court of Appeals pointed out in connection with the statute that:

> ". . . the very person or corporation that manufactures or distributes the product sets the price at which the

retailer may and must sell, without any right of any kind or character on the part of any representative of the State, to challenge it for price, quality or otherwise. This, to me, is uncontrolled monopoly run riot with State sanction."

339 P. 2d at 1024.

Mr. Justice Peters of the California Supreme Court, who dissented in the Allied Properties case, supra, also stated in his dissent in the Wilke and Holzheiser case that:

". . . the fair trade provisions of the Alcoholic Beverage Control Act, together with the disciplinary power given the Department of Alcoholic Beverage Control directly by the Constitution, comprises a mandatory price fixing system whereby the producers or wholesalers of branded or trade-marked alcoholic beverages fix the retail prices of those beverages, and adherence to the prices is guaranteed by threat of imposition by the State of Civil and Criminal sanctions upon non-complying retailers."

55 Cal. Rptr. at 44.

He then concluded that:

"It is apparent from an analysis of the liquor fair trade law, however,

that it bears no relation at all to the purported objective of promoting temperance. While the stated purpose of the law is to restrict the sale and consumption of alcoholic beverages the use of fair trade contracts as a means necessarily guarantees that that objective will not be achieved." (Emphasis added.)

55 Cal. Rptr. at 47.

The California price fixing statute violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution because it is enforced by the State of California for the benefit of liquor manufacturers and against liquor retailers while no other manufacturers of any other goods have this privilege and no other retailer of goods are subject to this discipline and enforcement, and, because, with no basis for the distinction, two different trading areas are set up within the State and the manufacturer can file one price for Northern California and another price for Southern California. The taxpayers of California thus support a non-governmental special segment of the economy.

Furthermore, the effect of mandatory price fixing is to make drinking of branded liquors economically impossible only for low income groups who are required to purchase non-branded alcoholic beverages which are sold at substantially reduced prices. California statutes also allow a ten per cent (10%) discount on brand

items for case purchases. Thus, the wealthy not only are the only ones who can afford the branded fair traded items, but if they have sufficient purchasing power, they may avail themselves of a ten per cent (10%) discount not available to low income groups unable to purchase case lots. In effect, the system requires the poor to purchase alcoholic beverages of inferior quality and denies them the discount available.

Finally, the statute, if the purpose is to promote temperance by fixing high prices, in effect, fosters prohibition only for the economically disadvantaged and not for the poor in violation of the Equal Protection Clause of the Fourteenth Amendment.

Section 24755 of the California Business and Professions Code which sets up the price fixing statute, is a statute which is clearly written by and for the liquor distillers and on its face presently violates Federal anti-trust laws. Prior to 1961, the statute provided that branded alcoholic beverages in fair and open competition could be fair traded in California upon a price established by a contract or agreement. This was in line with the express provisions of the exemptions provided by the Miller-Tydings (15 U. S. C. A. §1) and McGuire (15 U. S. C. A. §45) acts.

The amendment in 1961 of Section 24755 (in response to a finding by a Superior Court that a revocation was improper because there had been no finding that the items were in fair and open competition as required by the statute and the exemption amendments to the Sherman

Act §1) eliminated the necessity of a contract or agreement and eliminated the requirement that the commodity be in fair and open competition.

The elimination of these requirements is clearly not in accord with the anti-trust immunity provided for by the Miller-Tydings and the McGuire Acts and minimum price fixing by agreement or compulsion is illegal per se under the Federal anti-trust laws unless the Federal exemption statutes apply. (See: United States v. McKesson & Robbins, 351 U.S. 305, 309-311 [1953] and Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 386-388 [1950]. It can be noted that the latter case concerned contracts for price fixing of liquor and it was still struck down by the United States Supreme Court.)

Since the California statute does not provide for either "fair and open competition" or for contracts, it is not immunized from Federal anti-trust laws. Eastman Kodak v. Federal Trade Commission (2nd Cir.), 330 U.S. 828, clearly hold that the Miller-Tydings amendment only validates retail price agreements with respect to pricing of commodities which are in effective competition with similar commodities produced by others.

Evidence of "lack of fair and open competition" has not been permitted before California administrative agencies or courts. See: DeMartini v. Department of Alcoholic Beverage Control, 215 Cal. App. 2d 787 and Dave's Market v. Department of Alcoholic Beverage Control, 222 Cal. App. 2d 671.

The California Attorney General, representing the Department of Alcoholic Beverage Control, has argued in the Wilke and Holzheiser and Allied Properties cases, supra, that the Twenty-first Amendment to the United States Constitution prevents any challenge of the California statute. It has since been established by the United States Supreme Court, however, that no such rule exists, e.g., in Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 12 L.Ed. 2d 350, 84 S. Ct. 1293, where the court states at 12 L. Ed. 2d, at page 356, that:

> "To draw a conclusion from this line of decisions that the Twenty-first Amendment has somehow operated to repeal the commerce clause wherever regulation of intoxicating liquors are concerned, would be an absurd over simplification."

The Supreme Court in 1966 held, in Joseph E. Seagram, Inc. v. Hostetter, 86 S. Ct. 1254, that the Twenty-first Amendment must be read in light of the other amendments of the Constitution, and although the court upheld the New York law being questioned there, it clearly established the principle that the State law had to be a reasonable law and not deny the requirements of Equal Protection of the laws as provided by the Fourteenth Amendment.

The facts found by the "Moreland Commission on the Alcoholic Beverage Control law" appointed by Governor Rockefeller regarding the background and ineffectiveness of mandatory

price fixing laws also demonstrate the evils of such laws. It was The Moreland report which caused New York to change its mandatory price fixing statute (which previously was like California's statute) and to pass the present New York statute held constitutional in Seagram & Sons v. Hostetter, 384 U.S. 35, 16 L. Ed.2d 336, 86 S. Ct. 1254. The Moreland Commission found, at page 1 of the report, that,

> "The mandatory price control should be eliminated because (1) New York consumers are compelled to pay unnecessarily high prices for packaged liquor, (2) competition is stifled and economical waste encouraged."

The statute further constitutes special legislation by the State of California for the benefit of manufacturers and wholesalers of alcoholic beverages.

The statute bears no reasonable relationship to the exercise of the police power of the State or the alleged object sought to be obtained, i.e., the promotion of temperance, indeed, the statute is designed to achieve the opposite effect.

The statute by granting state enforced price fixing powers to private persons also "is an unlawful delegation of legislative authority and is so arbitrary as to amount to a denial of due process" (dissenting opinion, Wilke and Holzmeiser, supra, 55 Cal. Rptr. at p. 49).

The Supreme Court is the only court

available now to rule on the constitutionality of the California statute. In Dave's Market v. Department of Alcoholic Beverage Control, (U.S. Dist. Ct. for No. Dist. of California, So. Div., No. 41103), a three judge District Court was convened but sent the matter back for determination on State issues. When the case was returned to the Federal Court, the determination was made that Federal issues must necessarily have been determined along with the State issues and therefore appeal to the Supreme Court was the only remedy. This was also essentially the decision in the District Court case of Wilke & Holzheiser v. Department of Alcoholic Beverage Control, 266 F. Supp. 168.

CONCLUSION

Legalized price fixing and monopoly should be subject to careful scrutiny by the courts to insure strict compliance with the federal exceptions. When a statute allows a manufacturer to set an arbitrary price at which his commodity must be sold throughout the state and then when the state enforces this price at no expense to the manufacturer the consumer is harmed. Not only is the consumer forced to pay the higher price he is also required, by way of taxes for the state enforcement, to pay the cost of enforcing the higher prices.

Such a state sanctioned monopoly and gratuity to liquor manufacturers should not be tolerated. A full briefing of the matter should

be allowed by this Court for the protection of the consumers of the State of California and other consumers in states having similar laws.

Respectfully submitted,

JACQUES LESLIE

LAWRENCE TEPLIN

Attorneys for Appellant

APPENDIX "A"

RECEIVED
MAR 15 1968

FILED
MAR 18 1968
Alcoholic Beverage Control
Appeals Board

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Accusation against	) AB-2646) File No. 48430;) Reg. No. 8125
SAMSON'S MARKET COMPANY, INC. dba Samson's 6656 Sunset Boulevard Los Angeles	) Time & Place of Hearing:) December 15, 1967, @ 10 a.m. 1525 South Broadway - Los Angeles, California
off-sale general (retail package) license	) For Department:
Respondent-Licensee	) Honorable Thomas Lynch, Attorney General
under the Alcoholic Beverage Control Act.	) Henry Ullerich - Deputy Attorney General

For Appellant:
Lawrence Teplin, Esq.

This is an appeal by Samson's Market Co., Inc., from a decision of the Department of Alcoholic Beverage Control in which it was

determined that appellant violated section 24752, Alcoholic Beverage Control Act (selling below fair trade price); section 24755 of said act (selling distilled spirits for less than the effective minimum retail prices); rule 99 of title 4, California Administrative Code (minimum retail price schedules); and article XX, section 22 of the California Constitution (conduct contrary to public welfare or morals). Upon its determination that the above violations constituted cause for discipline, the department imposed a penalty revoking appellant's off-sale general license.

Appellant's appeal is based upon the grounds:

> "(a) Whether the department has proceeded without, or in excess of, its jurisdiction.
>
> "(b) Whether the department has proceeded in the manner required by law.
>
> "(c) Whether the decision is supported by the findings.
>
> "(d) Whether the findings are supported by substantial evidence in the light of the whole record.
>
> "(e) Whether there is relevant evidence, which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before

the department."

In addition, appellant raises, by way of argument, issues related to due process and to the interpretation of state statutes and the California Constitution.

The decision of the department contains the following:

"FINDINGS OF FACT

"COUNT I

"On or about September 10, 1965, respondent-licensee, then being licensed under the above-designated off-sale general license at the above-designated premises, through an agent or employee known as 'Jack', did offer for sale and did sell to Gary Stucker, alcoholic beverages in sizes, in quantities, and at the retail price more particularly set forth below. Patterson's California Beverage Gazetteer for September, 1965, set forth the minimum retail price as $10.54 plus tax for said alcoholic beverages.

"Quantity	Size	Brand Name	Sale Price
2	4/5 quarts	Early Times .86 proof Kentucky Straight Bourbon Whiskey	$9.87 including tax

"COUNT II

"On or about September 21, 1965, respondent-licensee, then being licensed under the above-designated off-sale general license at the above-designated premises, through an agent or an employee whose name is unknown, described as being male Caucasian, 50-55 years of age, approximately 5 feet 9 inches tall, weighing approximately 150 pounds, with black hair streaked with grey and wearing glasses, did offer for sale and did sell to Herbert Steinberg alcoholic beverages in sizes, in quantities, and at retail price more particularly set forth below. Patterson's California Beverage Gazetteer for September, 1965, set forth the minimum retail price as $14.97 plus tax for said alcoholic beverages.

"Quantity	Size	Brand Name	Sale Price
3	4/5 quarts	Antique Kentucky Straight Bourbon Whiskey	$13.25 including tax

"COUNT III

"On or about October 8, 1965, respondent-licensee, then being licensed under the above-designated off-sale general license at the above-designated premises, through an agent or employee known as 'John', did offer for sale and did sell to Richard Cottingham alcoholic beverages in sizes, in quantities, and at retail price more particularly set forth below. Patterson's California Beverage Gazetteer for October, 1965, set forth the minimum retail price as $15.81 plus tax for said alcoholic beverage.

"Quantity	Size	Brand Name	Sale Price
3	4/5 quarts	Early Times 86 proof Kentucky Straight Bourbon Whiskey	$13.98 including tax

"Patterson's California Beverage Gazetteer is distributed to off-sale retail liquor establishments in the Southern California trading area solely upon paid subscription thereto.

"FINDINGS AS TO PREVIOUS RECORD

"Licensed as above 1-4-60 to date. Disciplinary action: Reg.

13045, 3-2-60, 24750 & 99(f), 30 days susp., op. 4-1-60. Reg. 13273, 3-29-60, 25503(c), 25660, 24200(b), dismissed 7-10-61.

"DETERMINATION OF ISSUES PRESENTED

"Grounds for suspension or revocation were established in that respondent violated or permitted a violation of Sections 24752 and 24755 of the Business and Professions Code, Rule 99 of Title 4, California Administrative Code and Article XX, Section 22 of the State Constitution.

"ORDER

"The license is revoked."

The function of this board, an appellate administrative tribunal charged with reviewing decisions of the department, is well established. Both the Constitution (article XX, section 22) and applicable statutes (sections 23084, 23085, Alcoholic Beverage Control Act) indicate that our reviewing functions are limited. (Martin v. Alcoholic Bev. Control Appeals Bd. & Richards, 52 Cal. 2d 238, 340 P. 2d 1.)

The scope of review on the question of whether the department's decision is supported by substantial evidence in the light of the whole record is governed by the "substantial evidence

rule." That is, if the record contains any evidence that may be regarded as supporting the department's position, then the department's decision must be affirmed. We must consider the evidence in the light most favorable to the department's findings, indulging in all legitimate and reasonable inferences in support thereof. (Marcucci v. State Bd. of Equal., 138 Cal. App. 2d 605, 292 P. 2d 264.)

Preliminarily, it should be noted that the department's accusation alleged grounds for suspension or revocation of appellant's license under article XX, section 22, State Constitution, and section 24200(a), Alcoholic Beverage Control Act, counts I, II, and III; additional grounds under sections 24200(a) and (b) of the Alcoholic Beverage Control Act were alleged as to rule 99, counts I, II, and III. Prior to hearing on the merits before a hearing officer from the Office of Administrative Procedure, appellant's motion to strike section 24752 as a ground for suspension or revocation of the license was granted. (Proposed Decision, File 21-48430, page 1.)

The department, under authority of section 11517(c), Administrative Procedure Act, rejected the hearing officer's proposed decision and on July 1, 1966, issued its decision which included, under determination of issues, a violation of section 24752 as grounds for suspension or revocation. (Department's decision, File 48430, page 2.)

Heretofore, the department and the appeals

board have acknowledged that section 24752 is a remedial statute only and that the Legislature in enacting section 24752 did not intend that the department enforce the provisions of this section. (Department decisions, re David and Rose Canter, File 58542, Reg. 2807, AB-2268; and Westside Market, Inc., File 40590, Reg. 2879, AB-2308.)

The granting of appellant's motion as to section 24752 was not contested by the department and the record reveals no evidence which might support a determination of a violation of section 24752. Consequently, any finding based upon this section is in error. However, in reviewing the circumstances, this board is of the opinion that the error, being clerical in nature, is harmless and in no way prejudices appellant.

The instant case is the first decision of this board subsequent to the appellate court decision of Reimel v. Alcoholic Bev. Control Appeals Bd., et al., 256 A. C. A. 784, 64 Cal. Rptr. 26, which involves a number of fair trade issues, particularly proper filing and publishing of minimum resale prices of distilled spirits in accordance with section 24755 of the Alcoholic Beverage Control Act and rule 99 of title 4, California Administrative Code. This issue of publication has now been settled by the Reimel decision, supra. In upholding the department's decision, the court stated:

> "We conclude that the Department's determination that the words

in question, in the context of the Act and its section 24755, indicated a legislative intent that the price schedules be published in a manner most likely to give notice to the affected licensees is reasonable and correct. This interpretation gives effect to each of the words and phrases under consideration. It brings them to a degree of harmony with each other not otherwise possible. And it is consistent with the usual meaning given the word 'published' by the Legislature and by the courts.

"The Department's interpretation is in accord with the general legislative practice of prescribing publication in such a manner as is best designed to give notice to persons concerned. And it imposes no hardship upon the individual licensee who is under an affirmative duty to conduct his business in accordance with law. (See Morell v. Department of Alcoholic Beverage Control, supra, 204 Cal. App. 2d 504, 514; Munro v. Alcoholic Beverage Control Appeals Bd., 181 Cal. App. 2d 162, 164; Cooper v. State Board of Equalization, 137 Cal. App. 2d 672, 678.) . . ."

* * *

". . . Accordingly, the record

before us discloses that the Department did sustain its burden of proving publication of minimum retail price schedules as required by section 24755."

Judicial opinions rendered by the Court of Appeal are controlling upon the Alcoholic Beverage Control Appeals Board.

We have reviewed the record certified to the board by the department in the light of the above Court of Appeal decision, and conclude that there is substantial evidence to support the department's findings and that the findings support the department's decision.

We also conclude that appellant's arguments regarding constitutionality, statutory interpretation, and denial of due process are disposed of by previous decisions rendered by the California Supreme Court: Wilke & Holzheiser v. Dept. of Alcoholic Bev. Control, 65 Cal. 2d 385, 55 Cal. Rptr. 23; Allied Properties v. Dept. of Alcoholic Bev. Control, 53 Cal. 2d 141, 346 P. 2d 737; and by the recent Court of Appeal's decision, Reimel v. Alcoholic Bev. Control Appeals Bd., et al., supra, 256 A. C. A. 784, 64 Cal. Rptr. 26.

We now turn to the question of jurisdiction. In 1965 the Legislature added section 24755. 1 to the Alcoholic Beverage Control Act (Business and Professions Code). This statute became effective on September 17, 1965, and provided for the imposition of mandatory fines on a

graduated basis for violations of fair trade regulations. Appellant argues that the department is limited to section 24755.1 exclusively in determining the type and extent of discipline to be imposed on licensees who violate section 24755 of the Alcoholic Beverage Control Act.

The department argues that section 24755.1 does not limit the department's power because article XX, section 22 of the State Constitution vests the department with discretion to suspend or revoke a license when it determines for good cause that continuance of the license would be contrary to public welfare or morals. Moreover, the department maintains that insofar as section 24755.1 would impair or defeat discretionary powers granted by the Constitution, the section is invalid.

Since count I concerns a violation occurring prior to the effective date of section 24755.1, the issue posed is one of retroactive application of the statute. The court in Wilke & Holzheiser v. Dept. of Alcoholic Bev. Control, supra, 65 Cal. 2d 385, 55 Cal. Rptr. 23, denied a similar request and in Reimel v. Alcoholic Bev. Control Appeals Bd., et al., supra, 256 A.C.A. 784, 64 Cal. Rptr. 26, the court declared that the former Supreme Court decision precluded any further consideration of the issue of retroactively. However, the court allowed that the department could elect to review penalty assessments before they are placed in effect, citing section 25211 of the Alcoholic Beverage Control Act.

The remaining counts of the instant case,

counts II and III, concern violations that occurred subsequent to the effective date of section 24755.1 and, therefore, present the question of whether the department has exceeded its jurisdiction by electing to impose a penalty of revocation, rather than a monetary penalty, for violation of section 24755 of the Alcoholic Beverage Control Act; rule 99 of title 4, California Administrative Code; and article XX, section 22 of the State Constitution.

The Supreme Court preferred not to espouse an interpretation which would invite constitutional difficulties unnecessarily when it decided that section 24755.1 did not operate retroactively. (Wilke & Holzheiser v. Dept. of Alcoholic Bev. Control, supra, 65 Cal.2d 385, 55 Cal.Rptr. 23.). Nevertheless, the court commented on the issue as follows:

> "Prior to the enactment of section 24755.1 (citation omitted), violation of the retail price maintenance provisions of the Alcoholic Beverage Control Act subjected the transgressor not only to the discretionary suspension or revocation of his license (Bus. & Prof. Code, sec. 24200) but also to punishment as a misdemeanant by a fine of not more than $500 and/or a county jail term of not more than six months (Bus. & Prof. Code, sec. 25617). By enacting section 24755.1 the Legislature replaced this method of enforcement with a system of mandatory

fines leviable by the Department of Alcoholic Beverage Control in the amount of $250 for the first illegal sale and $1,000 for each subsequent such sale in any three-year period. Pending any appeal from the imposition of a fine, the new section required a licensee to pay under protest a fine, which was recoverable with interest if the appeal succeeded, or to execute a surety bond in the amount of the fine. The failure to perform either undertaking within 30 days provoked an automatic suspension of the license pending performance.

"Article XX, section 22, of the California Constitution empowers the Department of Alcoholic Beverage Control 'in its discretion' to 'deny, suspend or revoke any specific alcoholic beverage license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals, . . .' At the same time, section 22 empowers the Legislature to 'provide for the issuance of all types of [alcoholic beverage] licenses' and gives to the Department of Alcoholic Beverage Control 'the exclusive power . . . in accordance with laws enacted by the Legislature, to license the . . . sale of alcoholic beverages. . . .'

(Italics added.)

"If we were to hold section 24755.1 applicable to the judgments here on appeal, we would be compelled to decide, first, whether that section constitutes an invalid limitation upon the power vested in the department by article XX insofar as it eliminates the department's discretionary power to suspend or revoke a license for violation of the retail price maintenance provisions; and, second, whether that section constitutes an invalid extension of the power vested in the department by article XX insofar as it adds the power to impose mandatory fines for violation of the retail price maintenance provisions. 18/ . . ."

"18/ No fines are directly involved in these proceedings, but the provisions of section 24755.1 are clearly inseverable, and if we were to decide that article XX invalidates the provision requiring the department to impose fines, then we should be compelled to conclude, as a matter of legislative interpretation, that all of section 24755.1, including its prohibition against license suspension or revocation, is inoperative."

This board has reviewed the record and the authorities favoring the view points of appellant and respondent and concludes that section 24755.1 does not displace or render ineffective the discretion which the Constitution reposes in the department. Consequently, the department did not exceed its jurisdiction by failing to apply the penalty provisions of section 24755.1.

In view of the foregoing, the decision of the Department of Alcoholic Beverage Control in the present proceeding is hereby affirmed.

DONALD R. WAGNER,
CHAIRMAN
ALCOHOLIC BEVERAGE
CONTROL APPEALS BOARD

We Concur:
Robert I. Tuttle
Adrienne Sausset

Sacramento, California
March 11, 1968

APPENDIX "B"

CALIFORNIA BUSINESS AND PROFESSIONS CODE

§24755. Minimum retail price schedule; filing; amendments; loss leader sales; rejection of noncomplying schedules; exempt sales. (a) No package of distilled spirits which bears the brand, trademark or name of the owner or person in control shall be sold at retail in this State for consumption off the license premises unless a minimum retail price for such package first shall have been filed with the department in accordance with the provisions of this section.

(b) A price for each of such packages shall be in a minimum retail price schedule setting forth with respect to each package the exact brand, trademark or name, capacity, and type of package, type of distilled spirits, age and proof, where stated on the label, and the minimum selling price at retail. The price for any such package may be filed separately and differently for the trading area of Southern California and the trading area of Northern California. The trading area of Southern California shall consist of the Counties of Santa Barbara, Ventura, Los Angeles, Orange, Riverside, San Bernardino, Imperial and San Diego. The Northern California trading area shall consist of the other counties of the State. No more than one person shall file a schedule for the same package for the same trading

area. Any person filing such schedule shall cause such schedule to be published in a manner which will result in each retailer affected by such schedule being advised of the contents of such schedule prior to the effective date thereof.

(c) Such schedule shall be filed by (1) the owner of the brand, if licensed in the State; (2) any licensee, other than a retailer, selling the brand and who is authorized in writing by the brand owner to file such schedule if the brand owner is not licensed in this State; (3) a manufacturer or rectifier licensed in this State and who bottles under the brand owned by a retailer; or (4) any licensee with the approval of the department, if the owner of the brand does not file or is unable to file a schedule or authorize a licensee other than a retailer to file such schedule.

(d) Schedules filed pursuant to this section may be amended, changed, or modified by filing such amendments, change, or modification with the department on or before the 15th day of any month to take effect on the first day of the second succeeding calendar month; except that prices filed for a brand, size, or type not included in a schedule in effect at the time such brand, size, or type is filed, and prices filed to meet the price of a competitive brand, may be filed on or before the 15th day of any month to take effect on the first day of the following month. For the purpose of this

section, a competitive brand shall mean any brand of the same type of distilled spirits having a filed selling price at retail within one dollar($1) per gallon of the brand for which a competitive price is filed.

No retailer shall sell any package of distilled spirits as a loss leader. "Loss leader," as used in this section, means a sale below cost as such cost is defined in Sections 17026 to 17029, inclusive, of this code, except that a sale below cost made under the provisions of Section 17050 of this code shall not be deemed a loss leader sale.

The department shall reject any price schedule which does not comply with this subdivision.

(e) No offsale licensee shall sell any package of distilled spirits at any price less than the effective filed price of such package unless written permission is granted by the department, for good cause shown and for reasons not inconsistent with this division.

(f) The provisions of this section shall not apply to:

(1) A closeout sale made in good faith and approved by the department when the following conditions exist: (i) the stock of distilled spirits sought to be closed out has

been in this State, either in the possession of the vendor who sold it to the retailer or in the possession of the retailer who seeks to close out the brand, for a period of not less than six months; (ii) the stock of distilled spirits to be closed out was not brought into this State for the purpose of offering it, or any part of it, at a closeout sale; (iii) at least 10 days prior to filing a request with the department for approval to sell the stock at a closeout sale, the retailer had offered to return the distilled spirits, at his original invoice cost, to both the vendors from whom he purchased them or to his successor and to the licensee who filed the minimum price schedule under the provisions of this section; (iv) such offer of return was not accepted.

At the place of any closeout sale and upon any package of distilled spirits to be so sold and in any advertisement in connection therewith, public notice shall be given of the sale as a closeout sale. Following the conclusion of a closeout sale, the retailer who conducted such sale shall not sell the same brands of distilled spirits for a period of at least one year.

(2) Sales made with the approval of the department when the distilled spirits or the package is damaged or deteriorated in quality and notice of this fact is given to the public at the place of any such sale and upon the package offered for sale and in any advertisement in connection therewith.

(3) Sales made by any officer acting under the orders of any court.

(g) A minimum retail price schedule containing a minimum retail price for each package of any brand of beer may be filed under the provisions of this chapter by the person in control of such brand and when so filed, the provisions of this chapter and any rules adopted by the department for the administration of the provisions of this chapter shall apply to the sale of packages of such brand of beer. (Added Stats. 1961, c. 635, p. 1835, § 4.)

99. Minimum Retail Price Schedules. (a) Posting of Minimum Retail Price Required. No off-sale licensee shall sell any package of distilled spirits at a price less than the effective minimum retail price of such package filed with the department, unless written permission is granted by the department for good cause shown and for reasons not inconsistent with the law.

The licensed owner or person in control of a brand, trade mark or name appearing on a package of distilled spirits which is to be sold for consumption off the licensed premises in California must file a "Distilled Spirits Minimum Retail Price Schedule" containing the minimum bottle and case prices to consumers for every distilled spirits item carrying that brand, trade mark or name.

(b) Brand Defined. The word "brand" as used herein means "brand, trade mark, label or name", and if an additional secondary name or a different form of label is used, each will be considered to be a separate brand.

(c) Distilled Spirits Item Defined. "Distilled spirits item" as used herein means a distilled spirits package that differs from all other distilled spirits in addition to its brand, as defined in (b) above, in any one of the following categories: (1) Type of distilled spirits including type of bottling (in

bond or not in bond), and type of blend (blend of straight whiskeys or spirits blend); (2) Percentage of Straight Whiskey; (3) Age, if shown on the label; (4) Proof; (5) Origin (domestic or imported); (6) Bottle size; and (7) Number of bottles in a case.

When a container other than the normal container for a brand is used as in the case of a decanter, higher minimum retail prices must be established to reflect any additional cost involved.

(d) Distilled Spirits Sold "On-Sale" Only. If a particular item is labeled to indicate that it is intended for sale to and for dispensing by on-sale retailers only (such as "bar package", "for on-sale only"), the minimum retail price thereof need not be filed. However, if any sale for off-sale consumption of such item should be made, the licensee making such sale will have violated the law.

(e) Who Files Minimum Retail Price Schedules. Only one licensee is permitted to file a "minimum retail price schedule" containing the price for the same item for the same trading area. However, different prices may be filed in the Northern and Southern trading areas.

This means that (1) the owner of the brand or the corporate subsidiary who exclusively markets the products thereof and so is the controller of the brand, if licensed in California, if other than a retailer, must file;

or (2) if the owner of the brand is not licensed in California and has no corporate subsidiary marketing in California, any licensee, other than a retailer, authorized by him in writing must file, such as a wholesaler or importer authorized by an out-of-State or out-of-country brand owner; or (3) if the brand is owned by a retailer, the California-licensed manufacturer or rectifier who bottles an item of distilled spirits under that brand must file for the item; or (4) if none of the three situations above apply and the brand is owned by a retailer, the importing wholesaler must file. If none of the three situations above apply and the brand is not owned by a retailer, then any licensee, other than a retailer, who secures the approval of the department must file.

(f) Price Schedule Sheets to be Filed. Four copies of a "Distilled Spirits Minimum Retail Price Schedule" on a form prescribed by the department must be filed with the department, 1215 O Street, P. O. Box 1139, Sacramento 5, and one copy retained by the licensee in his office for inspection. The "Minimum Retail Price Schedule" may be printed, typewritten or otherwise duplicated on 16 or 20 pound paper on a format and size prescribed by the department and must show the form number "ABC 705" in the lower left-hand corner of the face of the sheet. All information called for on the form sheet must be supplied. A separate set of "Price Schedules" must be made originally, or if added later as a new item, for every different type of distilled spirits, and if that type has

different categories as defined in (2), (3), (4) and (5) in the definition of "Distilled Spirits Item" in (c) above, a separate set must be made for each such difference. Each schedule must contain every bottle size (6) and every size of case (7) in which that brand, type, etc., will be sold. When a new bottle size or new size case is to be sold, or the price of any size of bottle or size of case already on file is to be changed either independently or to meet the price of a competitive brand, new sets of price schedules, in quadruplicate, must be filed to replace those on file and must also include all the information that was on the superseded schedule. Both minimum retail bottle price and minimum retail case prices covering all case sizes must be shown on the price schedules for each size and type.

(g) Filing Dates; New Item. A set of original schedules for new items must be filed on or before the close of business of the fifteenth day of any calendar month to take effect on the first day of the following month, provided, however, the price of such new item is published on or before the aforesaid effective date.

(h) Change of Minimum Retail Price on File. A set of replacement schedules must be filed on or before the close of business of the fifteenth day of any calendar month, to be effective on the first day of the second succeeding month; provided, however, the changed price is published on or before the

aforesaid effective date.

(i) Change in Price of an Item to Meet Price of Competitive Brand. A set of replacement schedules for competitive items must be filed on or before the close of business of the fifteenth day of any calendar month, to be effective on the first day of the following month; provided, however, such price change is published on or before the aforesaid effective date.

A competitive brand is a brand of the same type of distilled spirits as the brand for which a change in price is being filed and for which at the time of filing there is on file a "Price Schedule" sheet filed by some other licensee showing a minimum retail price for the competitive brand item within one dollar per gallon of the price being charged, and proportionately for smaller sizes. The same type of distilled spirits means one identical as to categories (1) and (5) in the definition of "Distilled Spirits Item" in (c) above; the price change involved must apply to the identical item indicated in categories (6) and (7).

If a price is filed to meet the price of a competitive brand, the price so filed shall be the same as the price which is being met.

(j) **Filing Date Exception.** Whenever the fifteenth day of any month falls on Saturday, Sunday or a legal holiday, the price schedules required to be filed may be filed not later

than the close of business the next business day.

(k) Publication. The person filing minimum retail price schedules shall cause prices for all items on every original price schedule and of every change of price or new price on every replacement price schedule to be published in a trade journal of general circulation in the trading areas affected on or before the effective date thereof. Publication of minimum retail prices for a brand sold only to a single retailer may be accomplished by the mailing of such price schedules by the importer, manufacturer, manufacturer's agent, rectifier or wholesaler, and any amendments thereto, to the retail licensee affected thereby. The schedule shall be deposited in the United States Post Office on or before the date or dates required for publication of price schedules as prescribed above in this paragraph, and the mailing shall be complete at the time of such deposit. A record of each such notification should be retained in the file of the posting licensee for three years.

(l) Deliveries. No manufacturer, wholesaler or rectifier shall make deliveries of any particular item of distilled spirits to any off-sale retail licensee before a "Price Schedule" with that item thereon has been filed with the department; thereafter he may make deliveries thereof within such time before the price becomes effective as would give the retailer reasonable time to get the

item ready for sale upon the price becoming effective.

(m) Withdrawal of Item from Price Schedule. No item may be deleted from a replacement "Price Schedule" once it has been filed on an original schedule until the department authorizes such deletion when the department makes a finding that the item is carried in wholesale and off-sale retail inventories in only very small quantities.

(n) Transfer of Price Filing Obligation. When, for any reason, price filing responsibility for any item is transferred from one licensee to another, the price schedules of the licensee then on file will continue in effect until replaced by an effective new filing by the successor which will be considered to be a schedule already on file.

(o) Tax Increase or Government Order. Pursuant to an order issued by the department, any price schedule may be changed at any time to reflect changes in federal or state excise taxes on distilled spirits or to comply with the requirements of any order issued by the federal government and relating to price control.

(p) Sales as Loss Leaders Prohibited. All distilled spirits minimum retail prices filed under the provisions of Section 24755 shall comply with all the provisions of said section including the provisions of subsection

(d) which prohibits the sale of distilled spirits as a loss leader. Any licensee filing distilled spirits minimum retail prices below the purchasing retailer's cost of acquisition plus said retailer's cost of doing business as referred to in said subsection shall produce evidence to show that such price was filed to meet the legal price of a competitor selling the same article or product.

NOTE: Authority cited for amendment filed 10-2-56: Sections 24757 and 25750, Business and Professions Code; Section 22, Article XX, California Constitution. Issuing agency: Department of Alcoholic Beverage Control. Additional authority cited: Sections 24749, 24750, 24751, 24752 and 25752, Business and Professions Code.

History: 1. Repealer and new section filed 9-12-61; designated effective 10-15-61. (Register 61, No. 18). For prior history, see Register 60, No. 16.

APPENDIX "D"

LAW OFFICES OF JACQUES LESLIE
9255 Sunset Boulevard
Los Angeles, California 90069

Telephone: CR 54424
BR 23212

Attorneys for Respondent

BEFORE THE
DEPARTMENT OF
ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA
P. O. BOX 1139
SACRAMENTO 95805

In the Matter of the Accusation Against	File 48430 Reg. 8125
SAMSON MARKET COMPANY 6656 Sunset Boulevard Los Angeles, California Off-Sale General License Respondent.	NOTICE OF DEFENSE UNDER SECTION 11505 OF THE GOVERNMENT CODE.
License Under the Alcoholic Beverage Act	REQUEST FOR HEARING

TO: THE DEPARTMENT OF
ALCOHOLIC BEVERAGE CONTROL:

The undersigned Respondent, named in the above entitled proceeding, hereby acknowledges receipt of a copy of the Accusation and the statement that a hearing may be requested in said proceeding by filing a Notice of Defense as provided in Section 11506 of the Government Code within fifteen (15) days after the service upon the undersigned of said Accusation. A hearing is hereby requested in said proceeding to offer defense to the charges contained in said Accusation.

Attached hereto is Respondent's NOTICE OF DEFENSE as provided in Section 11506, Government Code.

DATED: January 14, 1966.

Respondent: SAMSON MARKET COMPANY

LAW OFFICES OF
JACQUES LESLIE.

BY /s/ Daniel A. Schiffer
Daniel A. Schiffer
Attorneys for Respondent
9255 Sunset Boulevard-Suite 920
Los Angeles, California 90069

LAW OFFICES OF JACQUES LESLIE
9255 Sunset Boulevard
Los Angeles, California 90069

Telephone: CR 54424
BR 23212

Attorneys for Respondent

BEFORE THE
DEPARTMENT OF
ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA
P. O. BOX 1139
SACRAMENTO 95805

In the Matter of the Accusation Against	)	File 48430 Reg. 8125
SAMSON MARKET COMPANY 6656 Sunset Boulevard Los Angeles, California Off-Sale General License Respondent. License Under the Alcoholic Beverage Act	)	NOTICE OF DEFENSE UNDER SECTION 11505 OF THE GOVERNMENT CODE.

I. OBJECTIONS

Respondent objects to the above entitled and numbered Accusation and to each and every allegation in each of the counts thereof,

upon the following grounds:

1. Respondent objects thereto upon the ground that the same does not state acts or omissions upon which the agency may proceed.

2. Respondent objects to the form of the Accusation on the ground that it is so indefinite that Respondent cannot identify each transaction or prepare its defenses thereto.

3. Respondent objects to the form of the Accusation on the ground that it is so uncertain that Respondent cannot identify each transaction or prepare its defenses thereto.

II. AFFIRMATIVE DEFENSES

Respondent, by way of Affirmative Defenses, alleges:

1. that the said proceeding herein violates its rights under the California Constitution and the Constitution of the United States, and, more particularly, with respect to its right to equal protection under the laws of said jurisdictions, its right to due process as guaranteed by each of said Constitutions, and further that the said proceeding is oppressive and burdensome and without sanction of law in that the Department has exceeded its authority under the police powers of the state and is without jurisdiction pur-

suant to the constitutional grant of power and jurisdiction to said Department.

2. that the Alcoholic Beverage Control Act and the rules and regulations adopted pursuant thereto governing Fair Trade, as they are sought to be applied against Respondent, are violative of Respondent's rights under the Constitutions of the United States and of California in that they create arbitrary, unreasonable and preferential legislative and administrative provisions, each of which constitutes special legislation for the use and benefit of the alcoholic beverage vendors to the retailers thereof.

3. that the Alcoholic Beverage Control Act and the rules and regulation adopted pursuant thereto, as they are sought to be applied against Respondent, unlawfully delegate legislative power and thereby are null and void.

4. that the Alcoholic Beverage Control Act and the rules and regulations adopted pursuant thereto, as they are sought to be applied against Respondent, are violative of Article XX, Sec. 22 of the California Constitution.

5. that the Alcoholic Beverage Control Act and the rules and regulations adopted pursuant thereto, as they are sought to be applied against Respondent, constitute an unlawful, improper and excessive exercise of the police powers of this state, in the following respects:

(a) Neither said Act nor the rules and regulations adopted pursuant thereto, as they

are sought to be applied against Respondent, (1) is protective of the safety, welfare, health, peace and morals of the people of this state; (2) eliminates the evils of unlicensed and unlawful sale and disposition of alcoholic beverages; (3) promotes temperance in the use and consumption of alcoholic beverages.

(b) Said rules and regulations violate the Legislative intent as expressed in Sec. 23049 of said Act.

(c) The grounds for disciplinary action asserted by the Department exceed the authority conferred by Article XX, Sec. 22, California Constitution, and Sec. 24200 (a) and (b), Alcoholic Beverage Control Act.

(d) Each of the sections of said Act governing fair trade contracts and price posting, in all respects in which the same are sought to be applied against Respondent, are invalid, unlawful, and void in that they constitute:

(1) An unlawful exercise of police powers.

(2) The denial to Respondent of fundamental due process as required by the Constitution of the United States and of California.

(3) Such arbitrary, capricious, unreasonable and discriminatory classification and regulation of Respondent as a retailer as to

prevent the public from deriving the benefits of price and services competition among retailers while at the same time arbitrarily, capriciously, unreasonably and discriminatorily omitting comparable classification and regulation of suppliers to retailers of alcoholic beverages products as contemplated by Article XX, Sec. 22, California Constitution and legislation enacted in implementation thereof.

(4) An unlawful delegation to private, non-governmental persons and entities of the power to perform governmental duties enjoined upon the state by Article XX, Sec. 22, of the California Constitution.

(5) An unlawful appropriation and expenditure of public funds principally for the use and benefit of private, non-governmental persons and entities for non-public purposes, in violation of the Constitution of this state.

(6) An arbitrary, capricious, unreasonable and discriminatory division of the state into trading areas in violation of Sec. 23049 of the said Act.

6. the Accusation and each allegation in each of the counts therein:

(a) fails to allege facts sufficient to constitute a violation by Respondent of any public law in that neither Sections 24752 nor 24755 nor Rule 99 is applicable to Respondent.

(b) fails to allege reasonable or probable cause for the filing of the Accusation against Respondent for the reasons cited in Paragraph 6, subdivision (a) hereinabove.

7. Article XX, Sec. 22, California Constitution, proscribes the State or any agency thereof from engaging in the manufacture or sale of alcoholic beverages. The sections of Chapter 10 entitled "Alcoholic Beverages Fair Trade Contracts and Price Posting", purporting to empower the State to regulate, maintain and enforce retail prices, are null and void for the reason that an agency of the State, the department herein, serves as an agent of each vendor of alcoholic beverages whose retail price the department seeks to support and maintain.

8. The Accusation is defective in failing to allege Respondent's knowledge or notice of any so-called effective retail price.

9. Section 24200 (b), Business & Professions Code, is vague, ambiguous, unintelligible and incomprehensible.

DATED: January 14, 1966

Respondent: SAMSON MARKET COMPANY

LAW OFFICES OF JACQUES LESLIE

BY: /s/ Daniel A. Schiffer
Daniel A. Schiffer

Attorneys for Respondent
9255 Sunset Boulevard-Suite 920
Los Angeles, California 90069

APPENDIX "E"

LESLIE, SCHIFFER & RUBIN
9255 Sunset Boulevard-Suite 920
Los Angeles, California 90069

Telephone: CR 54424; BR 23212

Attorneys for Respondent-Licensee

STATE OF CALIFORNIA
THE ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

In the Matter of the Accusation against	File No. 48430 Reg. No. 8125
SAMSON'S MARKET CO., INC. 6656 Sunset Boulevard Los Angeles, California 90028 off-sale general license	
Respondent and Licensee	

TO: THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD AND THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL:

I

Respondent-Licensee, SAMSON'S MARKET CO., INC., by its duly authorized

counsel, LESLIE, SCHIFFER & RUBIN, by DANIEL A. SCHIFFER, hereby appeals from the Decision Under Government Code Section 11517(c) by the Department of Alcoholic Beverage Control, dated July 1, 1966, which did not adopt the Proposed Decision dated March 14, 1966 of Helen L. Gallagher, Hearing Officer, Office of Administrative Procedure, and from the Notice Concerning Proposed Decision dated April 21, 1966.

II

Respondent requests the right to file Opening and Reply Briefs and to appear and argue orally, as permitted by the rules of the Appeals Board.

III

GROUNDS FOR REVIEW

1. The Department has proceeded without jurisdiction;

2. The Department has proceeded in excess of its jurisdiction;

3. The Department has not proceeded in the manner required by law;

4. Neither Department's Notice nor its Decision are supported by the Findings;

5. Department's Findings are not supported by substantial evidence in the light of the whole record;

6. The statutes, rules and regulations sought to be enforced by the Department against Respondent are inapposite and inapplicable; moreover the so-called Alcoholic Beverages Fair Trade Legislation is unconstitutional in the respects urged in Respondent's Notice of Defense filed with the Department and which are hereby incorporated herein by reference, and in the Hearing before the office of Administrative Procedure. Further, Respondent incorporates by reference its Written Argument in Support of Proposed Decision Not Adopted by Department of Alcoholic Beverage Control.

Dated this 19th day of July, 1966 at Los Angeles, California.

SAMSON'S MARKET CO., INC.

BY LESLIE, SCHIFFER & RUBIN

BY _____
Daniel A. Schiffer
Attorneys for Respondent and Licensee
9255 Sunset Boulevard-Suite 920
Los Angeles, California 90069
Telephone: CR 54424; BR 23212

DECLARATION OF SERVICE

STATE OF CALIFORNIA)
: ss.
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 9255 Sunset Boulevard, Los Angeles, California. On June 10, 1968, I served the within JURISDICTIONAL STATEMENT on the persons required to be served by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as follows:

Thomas C. Lynch, Esq.
Attorney General
Lynn Henry Johnson, Esq.
Henry Ullerich, Esq.
Deputy Attorney Generals
600 State Building
Los Angeles, California

Mr. Robert Martin,
Chief Counsel
Alcoholic Beverage
Control Appeals Board
c/o Leo K. Gallant
Senior Counsel
1215 "O" Street
Sacramento, Calif. 95805

Department of Alcoholic Beverage Control
1215 "O" Street
Sacramento, Calif. 95805

SHARLYNE BERYL DAVIES
NOTARY PUBLIC CALIF.
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY

My Commission Expires March 10, 1969

Lawrence Teplin
Lawrence Teplin

Subscribed and sworn to before me
this 10th day of June, 1968.

Sharlyne Beryl Davies
Notary Public, State of California
County of Los Angeles

LIBRARY
SUPREME COURT, U. S.

IN THE

JUL 11 1968
JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1968

No. [redacted] 181

SAMSON MARKET COMPANY, INC., a California corporation,

Appellant,

vs.

EDWARD J. KIRBY, DIRECTOR OF THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA,

Appellee.

Motion to Dismiss Appeal for Want of a Substantial Federal Question.

THOMAS C. LYNCH,
Attorney General of the State of California,
WARREN H. DEERING,
Deputy Attorney General of the State of California,
HENRY G. ULLERICH,
Deputy Attorney General of the State of California,
600 State Building,
Los Angeles, Calif. 90012,
Attorneys for Appellee.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

Page

I.

The Statute Involved and the Nature of the Case 1

A. The Statute 1

B. The Proceedings Below 2

II.

The Case Presents No Substantial Question Not Previously Decided by This Court 3

Conclusion 8

TABLE OF AUTHORITIES CITED

Cases	Page
Allied Properties v. Dept. of Alcoholic Beverage Control, 53 Cal. 2d 141, 346 P. 2d 737	8
California v. Washington, 358 U.S. 64	5, 7, 8
Carter v. Virginia, 321 U.S. 131	5
Collins v. Yosemite Park Co., 304 U.S. 518	5
Crane v. Campbell, 245 U.S. 304	8
Crowley v. Christensen, 137 U.S. 86	4, 8
Department of Alcoholic Beverage Control v. Ammex Warehouse Co., 378 U.S. 124	5
Department of Revenue v. James B. Beam Distilling Co., 377 U.S. 341	5
Duckworth v. Arkansas, 314 U.S. 390	5
Gordon v. Texas, 355 U.S. 369	5
Hooper v. Duncan, 379 U.S. 27	5
Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324	5
Indianapolis Brewing Co. v. Liquor Commission, 305 U.S. 391	4, 7
Inman v. City of Miami, 389 U.S. 1048	5
Joseph S. Finch & Co. v. McKittrick, 305 U.S. 395	4, 7
Laird & Co. v. Cheney, 385 U.S. 371	5
Low v. Austin, 13 Wall. 29	5
Mahoney v. Triner Corp., 304 U.S. 401	4, 7
Mugler v. Kansas, 123 U.S. 623	4
Parker v. Brown, 317 U.S. 341	3
Parrott & Co. v. San Francisco, 131 Cal. App. 2d 332, 280 P. 2d 881	5
Plaza Liquor Stores, Inc. v. City of Atlanta, 381 U.S. 914	5

Page

Reimel v. Alcoholic Beverage Control Appeals Board, 256 A.C.A. 188, 64 Cal. Rptr. 26 8
Schwartz v. Kelly, 346 U.S. 891 5
Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 3
Seagram v. Hostetter, 384 U.S. 35 ..... 4, 5, 6
State Board of Equalization v. Young's Market, 299 U.S. 58 ..... 4, 7
United States v. Frankfort Distilleries, Inc., 324 U.S. 293 ..... 4, 5
Wilke & Holzheiser v. Department of Alcoholic Beverage Control, 65 Cal. 2d 349, 420 P. 2d 735 8
Ziffrin v. Reeves, 308 U.S. 132 ..... 4, 7

Statutes

California Administrative Code, Title 4, Sec. 99 2
California Business and Professions Code, Secs. 23080-23087 2
California Business and Professions Code, Sec. 24755 ..... 2, 3
66 Statutes at Large, p. 631 3
United States Code, Title 15, Sec. 1 3
United States Code, Title 15, Sec. 45 3
United States Constitution, Art. I, Sec. 8, cl. 3 5
United States Constitution, Art. I, Sec. 10, cl. 2 5
United States Constitution, Fifth Amendment 8
United States Constitution, Fourteenth Amendment 7, 8
United States Constitution, Twenty-First Amendment 4, 7, 8
United States Constitution, Twenty-First Amendment, Sec. 2 7

IN THE

Supreme Court of the United States

October Term, 1967
No. 1519

SAMSON MARKET COMPANY, INC., a California corporation,

Appellant,

vs.

EDWARD J. KIRBY, DIRECTOR OF THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA,

Appellee.

Motion to Dismiss Appeal for Want of a Substantial Federal Question.

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the appeal be dismissed on the ground that it does not present a substantial federal question.

I.

The Statute Involved and the Nature of the Case.

A. The Statute.

This appeal raises the question of the validity of the provisions of California's mandatory minimum retail price maintenance system for alcoholic beverages sold at retail in California. The principal statute and ad-

ministrative regulation concerned herein is section 24755 of the California Alcoholic Beverage Control Act (California Bus. & Prof. Code, Division 9) and section 99 of Title 4 of the California Administrative Code. Said provisions of law are attached to appellant's jurisdictional statement as Appendices "B" and "C".

B. The Proceedings Below.

Appellant's license to sell alcoholic beverages in the State of California was revoked for retail sales of liquor below the filed and published minimum retail price schedules on file with the Department of Alcoholic Beverage Control.

The Department's decision was appealed to the Alcoholic Beverage Control Appeals Board (California Bus. & Prof. Code §§ 23080-23087). By written opinion, the Appeals Board affirmed the decision of the Department. (Appellant's jurisdictional statement, Appendix A.)

Appellant's petition for writ of review to the California Court of Appeal, Second Appellate District, was denied without written opinion on April 24, 1968. Appellant's petition for hearing, writ of review, and stay order in the Supreme Court of the State of California was denied without opinion on May 22, 1968.

II.

The Case Presents No Substantial Question Not Previously Decided by This Court.

Appellant contends that section 24755 of the California Business and Professions Code violates federal anti-trust statutes.

The Sherman Act (15 U.S.C. §1) declared illegal contracts, combinations, or a conspiracy in restraint of trade. Where retail prices or marketing programs derive their authority and efficacy from the legislative command of the state, the Sherman Act is inapplicable. *Parker v. Brown,* 317 U.S. 341, 350 (1943).

The California Alcoholic Beverage Control laws do not require or sanction price fixing conspiracies, combinations, monopolies, unfair trade practices, unfair competition, or any other violation of federal law.

The declared purpose of the McGuire Act (15 U.S.C. 45) in 1952 was to:

> ". . . protect the rights of the States under the United States Constitution to regulate their internal affairs and more particularly to enact statutes and laws, and to adopt policies, which authorize contracts and agreements prescribing minimum or stipulated prices for the resale of commodities and to extend the minimum or stipulated prices prescribed by such contracts and agreements to persons who are not parties thereto. . . ." (66 Stat. 631).

The McGuire Act expressly validates the nonsigner clause and thus, in effect, reversed the decision of this Honorable Court in *Schwegmann Bros. v. Calvert Distillers Corp.,* 341 U.S. 384 (1951).

In reviewing changes in the New York Alcoholic Beverage Control law, this Honorable Court noted in *Seagram v. Hostetter,* 384 U.S. 35, at p. 45 (1966):

> "The appellants' contention that §9 violates the command of the Supremacy Clause needs no extended discussion. The argument is based upon a claimed inconsistency between §9 and the federal antitrust laws, specifically the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. §§ 1-7 (1964 ed.) and §9 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. § 13 (1964 ed.).
>
> *"In this as in other areas of coincident federal and state regulation, the 'teaching of this Court's decision * * enjoin(s) seeking out conflicts between state and federal regulation where none clearly exists.'* (Citation)" (Emphasis added)

Appellant's contention that the statutes and rules creating California's retail price maintenance system for liquor sold in California constitutes a denial of due process and equal protection of the law, presents no substantial federal question.

Both traditionally[1] and under the Twenty-first Amendment[2] the power of a state to regulate and

---

[1]*Mugler v. Kansas,* 123 U.S. 623, 657-671 (1887); *Crowley v. Christensen,* 137 U.S. 86, 91 (1890).

[2]*State Board of Equalization v. Young's Market,* 299 U.S. 58, 63-64 (1936); *Mahoney v. Triner Corp.,* 304 U.S. 401 (1938); *Joseph S. Finch & Co. v. McKittrick,* 305 U.S. 395 (1939); *Indianapolis Brewing Co. v. Liquor Commission,* 305 U.S. 391, 394 (1939); *Ziffrin v. Reeves,* 308 U.S. 132, 138 (1939); *United States v. Frankfort Distilleries, Inc.,* 324 U.S. 293 (1945).

control alcoholic beverages destined for use, distribution or consumption within its borders—including complete prohibition as well as any restriction falling short of prohibition even if discriminatory in nature—has been unconditional.

Except for cases involving: (a) foreign commerce,[3] (b) import-export[4], (c) interstate commerce in transit through the regulating state[5], (d) federal enclaves[6], and (e) possible intolerable burdens on interstate commerce *outside* of the regulating state[7], this Honorable Court has consistently denied certiorari or dismissed appeals for want of a substantial federal question in cases involving state regulation and control of alcoholic beverages destined for use, distribution or consumption within the state's borders.[8]

---

[3]U.S. Const. Art. I, § 8, cl. 3; *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964); *Department of Alcoholic Beverage Control v. Ammex Warehouse Co.*, 378 U.S. 124 (1964).

[4]U.S. Const. Art. I § 10, cl. 2; *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964); *Low v. Austin*, 13 Wall. 29 (1871); and see *Parrott & Co. v. San Francisco*, 131 Cal. App. 2d 332, 280 P. 2d 881 (1955).

[5]*Duckworth v. Arkansas*, 314 U.S. 390 (1941); *Carter v. Virginia*, 321 U.S. 131 (1944); *Gordon v. Texas*, 355 U.S. 369 (1958).

[6]*Collins v. Yosemite Park Co.*, 304 U.S. 518 (1938).

[7]*Seagram & Sons v. Hostetter*, 384 U.S. 35 (1966). Cf. *United States v. Frankfort Distilleries*, 324 U.S. 293, 299 (1945).

[8]*Schwartz v. Kelly*, 346 U.S. 891 (1953), appeal dismissed for want of a substantial federal question; *California v. Washington*, 358 U.S. 64 (1958), motion to file complaint denied; *Hooper v. Duncan*, 379 U.S. 27 (1964), appeal dismissed for want of a substantial federal question; *Plaza Liquor Stores, Inc. v. City of Atlanta*, 381 U.S. 914 (1965), cert. denied; *Laird & Co. v. Cheney*, 385 U.S. 371 (1966), appeal dismissed for want of a substantial federal question; *Inman v. City of Miami*, 389 U.S. 1048 (1968), cert. denied.

As but recently set forth by this Honorable Court in *Seagram v. Hostetter,* 384 U.S. 35 at 41-43 (1966):

". . . The appellants attack §9 on many constitutional fronts. They contend that its provisions place an illegal burden upon interstate commerce, conflict with federal antitrust legislation and thus fall under the Supremacy Clause, and violate both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. We find all these contentions without merit.

"Consideration of any state law regulating intoxicating beverages must begin with the Twenty-first Amendment, the second section of which provides that: 'The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.' As this Court has consistently held, 'That Amendment bestowed upon the states broad regulatory power over the liquor traffic within their territories.' (Citations) Just two terms ago we took occasion to reiterate that 'a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders.' (Citations)

". . . the present case concerns liquor destined for use, distribution or consumption in the State of New York. In that situation, the Twenty-first Amendment demands wide latitude for regulation by the State. We need not now decide whether the mode of liquor regulation chosen by a State in such circumstances could ever constitute so grave

an interference with a company's operations elsewhere as to make the regulation invalid under the Commerce Clause. (Citation) No such situation is presented in this case. The mere fact that §9 is geared to appellants' pricing policies in other States is not sufficient to invalidate the statute." (footnote omitted.)

In *Indianapolis Brewing Co. v. Liquor Commission,* 305 U.S. 391, 394 (1939), this Court held that state alcoholic beverage control laws, even though discriminatory in nature, could not be considered as in violation of the due process clause of the Fourteenth Amendment. And to the same point see *Mahoney v. Triner Corp.,* 304 U.S. 401 (1938) and *Ziffrin, Inc. v. Reeves,* 308 U.S. 132, 138 (1939).

In the recent case of *California v. Washington,* 358 U.S. 64 (1958), wherein the State of California sought to prevent the State of Washington from imposing discriminatory regulations on California wines being marketed in the State of Washington, this Court *refused* to hear the case, citing in its per curiam opinion: U.S. Constitution, Amend. XXI, § 2; *Indianapolis Brewing Co. v. Liquor Commission, supra; Joseph S. Finch & Co. v. McKittrick,* 305 U.S. 395; *Mahoney v. Joseph Triner Corp., supra;* and *State Board of Equalization v. Young's Market,* 299 U.S. 59.

Perhaps the most striking expression of the dominant role played by the Twenty-first Amendment with respect to state regulation of alcoholic beverages is that found in *State Board of Equalization v. Young's Market Co.,* 299 U.S. 59, 63-64 (1936):

". . . A classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth."

Since possession and sale of alcoholic beverages are not inherent rights of citizenship nor proprietary rights[9] and inasmuch as the Twenty-first Amendment constitutionally separates alcoholic beverages apart from all other commodities, this Court has held that the due process and equal protection clauses of the Fifth and Fourtenth Amendments are not controlling with respect to a state's regulation of alcoholic beverages within the state's borders.[10]

The California courts have consistently held that the retail price maintenance provisions of the Alcoholic Beverage Control Act are a valid exercise of the police power.

Allied Properties v. Dept. of Alcoholic Beverage Control, 53 Cal. 2d 141, 346 P. 2d 737 (1959);

Wilke & Holzheiser v. Department of Alcoholic Beverage Control, 65 Cal. 2d 349, 420 P. 2d 735 (1966);

Reimel v. Alcoholic Beverage Control Appeals Board, 256 A.C.A. 188; 64 Cal. Rptr. 26, 33 (1967).

Conclusion.

It is respectfully submitted that the appeal should be dismissed for want of a substantial federal question.

Dated: July 10, 1968.

THOMAS C. LYNCH,
Attorney General,
HENRY G. ULLERICH,
Deputy Attorney General,
Attorneys for Appellee.

---

[9]*Crowley v. Christensen,* 137 U.S. 86, 91 (1890); *Crane v. Campbell,* 245 U.S. 304, 308 (1917).

[10]U.S. Const. 21st Amendment; *California v. Washington,* 358 U.S. 64 (1958), and the authorities cited in footnotes 1 and 2, *supra.*

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

SAMSON MARKET CO., INC. *v.* KIRBY.

APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

No. 181. Decided October 14, 1968.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.